

Commenter: Hyperion Telecommunications, Inc.
Applicant: BellSouth
State: Louisiana
Date: August 4, 1998

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Second Application by BellSouth
Corporation et al. for Provision of
In-Region, InterLATA Services in
Louisiana)

CC Docket No. 98-121

**COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.
IN OPPOSITION TO BELL SOUTH'S SECOND APPLICATION
FOR INTERLATA AUTHORITY IN LOUISIANA**

Hyperion Telecommunications, Inc. ("Hyperion"), through undersigned counsel, hereby submits its comments on the second Section 271 application for in-region interLATA authority in Louisiana, filed by BellSouth Corporation et al. ("BellSouth") on July 9, 1998.

BACKGROUND AND STATEMENT OF INTEREST

Hyperion is a diversified telecommunications company whose affiliates provide facilities-based local exchange service in twelve states. Within BellSouth's region, Hyperion affiliates are certificated as local exchange carriers, and have interconnection agreements with BellSouth, in five states: Florida, Kentucky, Louisiana, Mississippi, and Tennessee. In Louisiana, Hyperion has

operational fiber only in Baton Rouge, through its partnership with Entergy Corporation.¹ Hyperion does not currently offer residential service in Louisiana.²

INTRODUCTION

BellSouth fails to satisfy the competitive checklist in two respects. First, BellSouth does not provide reciprocal compensation, as required by item (xiii) of the competitive checklist, because it refuses to pay reciprocal compensation for traffic terminated to customers of Hyperion who are Internet service providers, as well as customers of other competitive local exchange carriers ("CLECs") who are Internet service providers. Second, the performance measurements that BellSouth proposes for its OSS performance are inadequate.

¹ The Entergy-Hyperion partnership covers only the construction and operation of a local fiber network in Baton Rouge. BellSouth's description of a more extensive statewide network (*id.* ¶¶ 98, 102, 104) apparently refers to Entergy's stand-alone backbone network, (described by Wright in *id.* ¶ 96), which is not owned or operated by the Entergy-Hyperion partnership.

Contrary to BellSouth's assertion (Wright Public Affidavit, ¶ 98), Hyperion manages no networks in conjunction with any IXC's. In addition, Hyperion has no partnership with U.S. West Interprise in Louisiana. Compare Wright Public Affidavit ¶ 103.

² BellSouth states that Hyperion offers certain residential services, referring to a Hyperion residential tariff. Wright Public Affidavit, ¶ 101. Hyperion's tariffs describe residential services but do not set forth any rates for these services, and consequently do not constitute an offer of such services.

ARGUMENT

I. BELLSOUTH'S APPLICATION FAILS THE COMPETITIVE CHECKLIST IN REGARD TO PROVIDING RECIPROCAL COMPENSATION

The competitive checklist requires Regional Bell Operating Companies ("RBOCs") requesting interLATA authority to provide "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." 47 U.S.C. § 271(c)(2)(B)(xiii). Section 252(d)(2) requires RBOCs to comply with section 251(b)(5), which in turn requires reciprocal compensation arrangements for transport and termination of "telecommunications." 47 U.S.C. §§ 251(b)(5) & 252(d)(2). BellSouth, following the lead of other RBOCs, has taken the position that it will not provide reciprocal compensation for local calls terminating with an information service provider ("ISP"), including Internet service providers. BellSouth Brief at 64. However, the obligation to pay reciprocal compensation, under the Act as well as BellSouth's interconnection agreement with Hyperion, for transport and termination of "telecommunications" contains no exception for calls to ISPs. Consequently, BellSouth's refusal to pay reciprocal compensation for such calls violates the competitive checklist.

BellSouth's interconnection agreement with Hyperion obligates BellSouth to pay reciprocal compensation on all traffic that meets certain parameters without regard to the identity of the called

party.³ The Commission should not sustain BellSouth's attempt to evade these contractual obligations merely by referencing the identity of the called party.⁴

Under both the interconnection agreement and the Commission's regulations, reciprocal compensation must be paid for transport and termination of "local traffic," which the regulations define as traffic that "originates and terminates within a local service area." 47 C.F.R. § 51.701. The Commission has defined "termination" as "delivery of [local] traffic from [the terminating carrier's end office] switch to the called party's premises." Local Interconnection Order, 11 FCC Rcd 16015, ¶ 1040 (1996). When a call is made to an ISP, the caller dials the ISP's seven-digit number, and the ISP is the "called party." The call thus "terminates" at the ISP's premises, and is

³ The Interconnection Agreement between BellSouth and Entergy Hyperion Telecommunications of Louisiana provides: "The Parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for Local Traffic terminated to the other Party's customer." (Atch. 6 § 5.1). "Local Traffic" is defined as "any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which Bell South has a local interconnection agreement with an independent LEC, with which Hyperion is not directly interconnected." Atch. 11 p. 6. Copies of the relevant provisions were attached to Hyperion's comments on BellSouth's first Application for interLATA authority in Louisiana (CC Docket No. 97-231, Hyperion Comments filed November 25, 1997).

⁴ On July 31, 1998, Hyperion's affiliate in Tennessee filed a complaint against BellSouth in Tennessee to enforce the requirement in its interconnection agreement in Tennessee for payment of reciprocal compensation. BellSouth had refused to pay reciprocal compensation for ISP calls in Tennessee despite a ruling against it on the same issue by the Tennessee Regulatory Authority under its interconnection agreement with Brooks Fiber. In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Docket No. 98-00118, Initial Order of Hearing Officer (April 21, 1998), *aff'd* (June 2, 1998).

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"local traffic" under the Commission's regulations if those premises are within the same local service area as the caller.

The Commission has recognized that calls to ISPs are local, directing local exchange carriers to take any complaints they may have, regarding inadequate compensation for high volumes of traffic to ISPs, to state regulators. In re Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶ 346.

BellSouth itself treats calls to ISPs on its local network as local calls. Indeed, until it receives interLATA authority, BellSouth can not carry these calls unless they are local. If calls made to ISPs on the local network who are BellSouth customers are local traffic, calls to ISPs who are CLEC customers fall in the same category.

BellSouth argues that calls to ISPs do not "terminate" at the ISP, but rather at the various Web sites that the caller may be seeking to access, some (but not all) of which may be located in other LATAs. This argument is inconsistent with BellSouth's treatment of calls to ISPs that are its own customers as local.

Moreover, BellSouth's argument is wrong, because the information access that the ISP provides is an "information service," not "telecommunications." The 1996 Act expressly distinguishes between the two concepts, defining "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information" (47 U.S.C. § 153(43)); while "information services"

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includes "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" 47 U.S.C. § 153(20).

The Commission has applied this distinction to ISPs, concluding that the Internet access services they provide are information services, not telecommunications. In the Matter of Federal-State Joint Board on Universal Service, Dkt. 96-45 (Report to Congress) (rel. April 10, 1998) ("1998 Universal Service Report"), ¶ 73. As the Commission explained:

[T]he provision of Internet access service crucially involves information-processing elements as well [as transport elements]; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."

1998 Universal Service Report, ¶ 80 (emphasis added, footnote omitted). Previously, the Commission had rejected the argument that information services are like telecommunications merely because information services are offered "via telecommunications":

ISPs alter the format of information . . . while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent. When a subscriber obtains a connection to an [ISP] via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] offering. The language in Section 254(h)(2) also indicates that information services are not inherently telecommunication services.

In re Federal-State Joint Board on Universal Service, CC Dkt. No. 96-45, Report & Order ¶ 789 (emphasis added) (May 8, 1997).

In short, the telecommunications and information service elements of calls to ISPs are severable. The telecommunications element terminates at the premises of the ISP, and consequently

is "local traffic" subject to reciprocal compensation when the caller is in the same calling area. The information service is provided separately by the ISP, is sold by the ISP to its customer, and does not constitute part of the "telecommunications service" that the ISP's customer purchases from his or her local exchange carrier.

In addition to precluding a finding of compliance with item (xiii) of the checklist, BellSouth's position on reciprocal compensation also bears on the public interest issue. If CLECs cannot recover their costs for the transport and termination of calls to ISPs, they would face enormous, uncompensated costs, since the overwhelming majority of ISP traffic is incoming, and the overwhelming majority of the incoming traffic comes from BellSouth's customers. The result could well be to force CLECs out of the ISP market, giving BellSouth a de facto monopoly of this market and resulting in increased costs to ISPs and ultimately their customers. The result would be totally at variance with the public interest that Congress has declared in preserving "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." 47 U.S.C. § 230(b)(2).

II. BELLSOUTH'S PROPOSED PERFORMANCE STANDARDS ARE INADEQUATE

BellSouth proposes to measure and report its OSS performance on a state and regional level. However, discrimination takes place in the market, and at the present stage of local competition, CLEC competition tends to be concentrated in particular markets. Metropolitan Statistical Areas ("MSAs") are roughly equivalent to the markets in which CLECs will operate. Accordingly, BellSouth should measure and report its OSS performance on an MSA basis. Otherwise, real

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differences in performance between different types of areas may be masked. For example, in rural areas technology may be less modern and travel times for dispatch activities may be longer than in urban areas. In addition, in areas where BellSouth has no competition, it may be tempted to degrade its performance to lower its average for purposes of comparison to its CLEC competitors in urban areas, as long as the data is measured and reported on a statewide basis.

Measurement and reporting for ordering and provisioning of two-wire POTS loops should be separate from loops for more complex services. BellSouth has heightened incentives to discriminate against the latter type of loops, which are used more often in the provision of higher revenue-generating services. A separate category for complex loop types would assist in detecting such discrimination.

BellSouth proposes to exclude canceled service orders from its measurements of provisioning performance. Stacy Performance Aff't Exh. WNS-1 at 13, 14, 15, 18. Orders that are canceled after BellSouth misses the due date should not be excluded. Cancellation of the order at that point may reflect the customer's frustration with slow service, which should be reflected in the measurement. In addition, this is a situation in which BellSouth had an opportunity to make the date, and had it done so that fact would have been reflected in the measurement. Its failure to do so should also be reflected.

BellSouth's proposed Customer Trouble Report Rate would measure the number of trouble reports, divided by the number of service access lines in service at the end of the report period.

Stacy Performance Aff't Exh. WNS-1 at 23. That could mask discrimination against larger customers. Troubles should be tracked on a "per element" or "per circuit" basis.

BellSouth has proposed no provision for regular auditing of its performance reports. Given the incentives BellSouth will have to "shade" any embarrassing results, a provision for regular audit is essential.

Finally, BellSouth has proposed no enforcement mechanisms. The Commission has stated that its public interest determination will be affected by whether performance monitoring includes appropriate self-executing enforcement mechanisms.⁵ That is essential, because once BellSouth is admitted to the interLATA market, it may quickly recruit new customers with offers of "one stop shopping" packages, gaining a huge advantage over its competitors if they continue to face barriers to local entry created by continued inadequacies in interconnection and OSS during the pendency of administrative and judicial enforcement proceedings. Self-executing enforcement mechanisms are needed which impose a meaningful incentive to re-establish non-discriminatory performance promptly, and escalate with repeated incidents of discriminatory service or when individual results fall well outside the range of reasonableness.

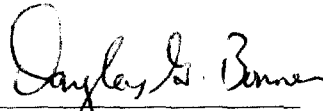
⁵ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan, CC Dkt. No. 97-137, at ¶ 394 (rel. August 19, 1997).

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CONCLUSION

For the foregoing reasons, BellSouth's application should be denied.

Respectfully submitted,



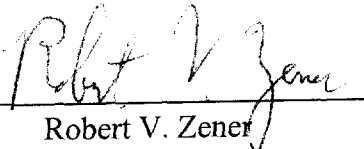
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. IN OPPOSITION TO BELLSOUTH'S SECOND APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA were served to each on the attached mailing list, either by Hand Delivery (as designated with an asterisk (*)), or by First Class Mail, postage prepaid, this 4th day of August, 1998.



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